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Supreme Court, U.S.
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No. 97-1422

In The

# Supreme Court of the United States

October Term, 1997

COUNTY OF THURSTON, NEBRASKA, and MARK CASEY, in his official capacity as Chair of the Board of Supervisors of Thurston County, Nebraska,

*Petitioners,*

vs.

HOLLIS D. STABLER, JR.; SHARON FREEMONT; OMAHA TRIBAL HISTORICAL PROJECT, INC.; and RED FEATHER FAMILY SERVICES, INC.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## REPLY BRIEF

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## ARGUMENT

### 1. THIS CASE VERY SQUARELY PRESENTS SUBSTANTIAL QUESTIONS RELATING TO THE EXISTENCE OF ROUGH PROPORTIONALITY IN VOTE DILUTION CASES BROUGHT UNDER THE VOTING RIGHTS ACT.

#### (a) The Issue of Whether the Existence of Rough Proportionality Should Be Determined on the Basis of Voting-Age Population Is One Which Is Clearly Presented Under the Facts in this Case.

The County respectfully suggests that the Eighth Circuit was clearly wrong in holding that rough proportionality did not exist in this case when judged on the basis of voting-age population. If that is true, then it follows that the decision of that court must be reversed unless the existence of rough proportionality can properly be determined on the basis of total population. Thus, the proper population base to be used for determining the existence of proportionality is an issue which is squarely presented by the County's petition for a writ of certiorari in this case.

The decision of the Eighth Circuit with regard to this issue was plainly contrary to the decisions of other courts which have considered the question. Indeed, in *African American Voting Rights Legal Defense Fund, Inc. v. Villa*, 54 F.3d 1345, 1352 (8th Cir. 1995) the Eighth Circuit noted that:

> *Johnson* clearly stands for the proposition that voting age population is a relevant population for proportionality purposes despite *Johnson's*

> refusal to hold that it is the only relevant population. Subsequent cases have unanimously interpreted *Johnson* as approving the use of voting age population as a relevant population. *See, e.g., NAACP v. Austin*, 857 F. Supp. 560, 569 (E.D. Mich. 1994) ("In assessing proportionality we use voting-age population figures, as the Supreme Court did in *DeGrandy*."); *see also Shaw v. Hunt*, 861 F. Supp. 408, 440 n.28 (E.D.N.C.), petition for cert. filed, 63 U.S.L.W. 3439 (U.S. Nov. 21, 1994) (No. 94-923); *Vera v. Richards*, 861 F. Supp. 1304, 1339 n.49 (S.D. Tex.) (three-judge district court), appeal filed, 63 U.S.L.W. 3388 (U.S. Oct. 31, 1994) (No. 94-805).

**(b) The Holding of the Eighth Circuit Court of Appeals that Rough Proportionality Did Not Exist When Determined on the Basis of Voting-Age Population Is Clearly Wrong.**

In their brief, the plaintiffs assert that the record "clearly establishes" the underrepresentation of Native-American voting strength measured on the basis of voting-age population. That is a remarkable statement which only serves to emphasize the rather profound confusion surrounding the concept of "rough" or "substantial" proportionality.

In *Johnson v. DeGrandy*, 512 U.S. 997 (1994), this Court held that:

> [N]o violation of § 2 can be found here, where, in spite of continuing discrimination and racial-bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population. . . .

*Id.* at 1000.

The facts in this case are that Native Americans constitute 35.9 percent of the voting-age population in Thurston County. They effectively control 28.57 percent of the seats on the County Board of Supervisors, which is 7.33 percent less than perfect proportionality. They want to control 42.85 percent of the seats, which is 6.95 percent more than perfect proportionality.

These facts clearly presented the Eighth Circuit with a situation where the "minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' . . . share[ ] in the voting-age population. . . . " *Id.* The Eighth Circuit Court of Appeals held that rough proportionality, judged on the basis of voting-age population, did not exist on these facts. How did the Court arrive at that conclusion? In the brief which they submitted to the Eighth Circuit Court of Appeals, the plaintiffs argued that:

> *DeGrandy* upheld a legislative districting plan where the proportion of majority-minority districts was within one or two percentage points of matching the proportion of minorities in the population. *Johnson v. DeGrandy*, 114 S.Ct. at 2663. This Court in *African American Voting Rights Legal Defense v. Villa*, 54 F.3d 1345, 1353 (8th Cir. 1995), applied *DeGrandy's* roughly proportional concept to mean representation at near parity, upholding a plan with proportionality within 1-2% of the minority population presence. The *Villa* Court noted that the difference there was "half of the 2.0% difference approved in *Johnson [v. DeGrandy]*." *Id.* Neither *DeGrandy* nor *Villa* provide support for denying plaintiffs a remedy where they are underrepresented by

> more than 7% considering voting age population. . . .

Plaintiffs' Eighth Circuit Brief at p. 30. The plaintiffs were very clearly arguing that rough proportionality, judged on the basis of voting-age population, did not exist because the minority was "underrepresented" by more than the "2.0% difference approved in *Johnson*." *Id.* It is clear that the Eighth Circuit agreed with this argument. (App. 12-13.)

The Eighth Circuit also said that rough proportionality did not exist because "the proposed three majority-minority districts plan results in less disparity than the current plan and more closely approximates rough, or substantial, proportionality, as discussed in *Johnson*." *Id.* In other words, rough proportionality, judged on the basis of voting-age population, did not exist because the 7.33% "underrepresentation" created under the current plan deviated from absolute proportionality by 38/100s of 1% more than the 6.95% overrepresentation created by a three majority-minority district plan. This sort of reasoning served as the foundation for the Eighth Circuit's conclusion that the County had unlawfully diluted the voting strength of Native-American voters. The County respectfully suggests that the Eighth Circuit's analysis finds no support whatsoever in the *Johnson* decision, and will serve to promote considerable confusion in this area of the law if left uncorrected.

**(c) Resolution of the Issues in this Case Would Not Require the Court to Engage in Any Intensive Fact Finding.**

The courts below erred in basing their conclusions concerning the existence of proportionality on incorrect legal standards. If this Court finds that to be the case, then the Court can either reverse the judgment of the Eighth Circuit Court of Appeals, or remand the case to the district court for reconsideration under proper legal standards.

It is very unlikely that a remand would be necessary. In *Johnson v. DeGrandy, supra* at 1000, this Court held that ordinarily no violation of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, can be found

> where, in spite of continuing discrimination and racial-bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population. . . .

In *Johnson,* the plaintiffs presented a particularly strong case under the totality of the circumstances test. Nevertheless, this Court easily determined as a matter of law the plaintiffs had failed to prove a violation under § 2 of the Voting Rights Act. The argument presented by the plaintiffs in this case was marginal at best, leading the district court to characterize its decision as a "close call." (App. 42.) The facts which the plaintiffs claim in their brief to have proved are a far cry from the actual findings of fact made by the district court. For example, the district court did not find that there was a history of official discrimination in Thurston County that touched the right

of the members of the minority group to register, to vote, or otherwise to participate in the democratic process. The plaintiffs sought to make that showing by asking the court to take judicial notice of numerous purported facts. That request was rejected by the district court in its entirety. Though given specific instructions by the district court concerning the necessity to do so, the plaintiffs never made any further effort with respect to their request that the court take judicial notice concerning these matters. (Tr. Vol. I at 8-10; 11:6-21).

The plaintiffs have also grossly exaggerated the strength of the case which they presented with respect to other matters. They mention purported economic disparities between Native Americans and non-Native Americans, but have totally ignored the findings made by the district court to the effect that "while these conditions exist, they do not appear to preclude Native Americans from participating in the political process since they are registered to vote in numbers comparable to whites." (App. 39-40.) The plaintiffs have also ignored the findings made by the district court that Native Americans "are active, well-received and productive members of the community;" and that "Native Americans have enjoyed some success in elections and employment." (App. 40.) In short, if the Court determines in this case that Native-American voters in Thurston County form effective voting majorities in a number of districts roughly proportional to their share in the relevant population, then the Court should have little difficulty in finding that the plaintiffs failed to prove a violation of § 2 of the Voting Rights Act as a matter of law.

**(d) Thurston County Is Not Seeking an Advisory Opinion From this Court.**

The plaintiffs' claim that Thurston County is seeking an advisory opinion in connection with this matter is absurd. The County seeks only justice with respect to the specific case which is currently before the Court. The County has merely suggested that the Court should hear this case because the decision of the Eighth Circuit will serve to create considerable confusion regarding the concept of rough proportionality; is contrary to the decisions of other courts which have held that the existence of rough proportionality should be determined on the basis of voting-age population; and is contrary to the Eighth Circuit's own decision in *African American Voting Rights Legal Defense Fund, Inc. v. Villa, supra* at 1352-53.[1] A real case and controversy exists with respect to this case. The fact that the Court's decision in this case would also provide much needed guidance in an extremely complex

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[1] In *African American Voting Rights Legal Defense Fund, Inc. v. Villa,* the Eighth Circuit Court of Appeals held as a matter of law that, where rough proportionality existed when determined on the basis of voting-age population, evidence indicating that rough proportionality did not exist when determined on the basis of total population was insufficient to create a genuine issue of fact.

area of the law is not, as the plaintiffs suggest, a reason for this Court to deny the County's petition.

COUNTY OF THURSTON, NEBRASKA; MARK CASEY, in his official capacity as Chair of the Board of Supervisors of Thurston County, Nebraska, Defendants

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